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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

CLARA B. WATSON, *Petitioner*

v.

FORT WORTH BANK & TRUST, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

Brief for Respondent

Bruce W. McGee*
Joseph W. Spence
GANDY MICHENER SWINDLE
WHITAKER & PRATT
2501 Parkview Drive, Suite 600
Fort Worth, Texas 76102
817/878-0565

Attorneys for Respondent

*Counsel of Record

Fort Worth Brief Printing Co., 610 South Jennings Avenue, Fort Worth, Texas 76104 Phone 817-332-4070

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS 1

SUMMARY OF ARGUMENT 5

ARGUMENT 7

I. The Decisions of This Court Restrict Disparate Impact Analysis to Objective Selection Procedures 7

II. The Legislative History of the 1972 Amendments to Title VII Does Not Support Application of Disparate Impact Analysis to Subjective Selection Criteria 18

III. Administrative Interpretation Has Not Been Consistent Regarding Application of Subjective Employee Selection Procedures to Disparate Impact Analysis 27

IV. The Disparate Impact Theory Should Not Be Applied to Claims Involving Subjective Employment Practices or Criteria Because the Disparate Impact Theory Is Inappropriate for Analysis of Such Claims 33

V. The Better Reasoned Decisions of the Courts of Appeals Recognize That the Disparate Impact Model Is Not Appropriate for Analyzing Subjective Employment Judgments 42

CONCLUSION 48

TABLE OF AUTHORITIES

Cases Page

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 12, 13, 14, 30, 34
Allen v. City of Mobile, 466 F.2d 122 (5th Cir. 1972) 25
Atonio v. Wards Cove Packing Co., 810 F.2d 1477
(9th Cir. 1987) (*en banc*) 43, 45

Bauer v. Bailar, 647 F.2d 1037 (10th Cir. 1981) 35
Brewster v. Barnes, 788 F.2d 985 (4th Cir. 1986) 44

City of Los Angeles Dept. of Water and Power v. Manhart,
435 U.S. 702 (1978) 40
Coates v. Johnson & Johnson Co., 756 F.2d 524
(7th Cir. 1985) 44
Coe v. Yellow Freight Sys., Inc., 646 F.2d 444
(10th Cir. 1981) 38
Connecticut v. Teal, 457 U.S. 440 (1982) 15, 17, 26, 34, 40, 41

Davis v. Califano, 613 F.2d 957 (D.C. Cir. 1980) 41
Dothard v. Rawlinson, 433 U.S. 321 (1977) 12, 13, 14, 23, 34
Douglas v. Hampton, 512 F.2d 976 (D.C. Cir. 1975) 30

EEOC v. Greyhound Lines, Inc., 635 F.2d 188
(3d Cir. 1980) 39

Firefighters Local Union No. 1784 v. Stotts,
467 U.S. 561 (1984) 25
Furnco Construction Corp. v. Waters,
438 U.S. 567 (1978) 13, 14, 36, 40

General Telephone v. EEOC, 446 U.S. 318 (1980) 20
Goodman v. Lukens Steel Co., 482 U.S. ___, 96 L.Ed 2d
572, 584, 107 S. Ct. ___ (1987) 42
Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985) 43, 45
Griggs v. Duke Power Co., 401 U.S. 424 (1971) ..... passim

Harris v. Ford Motor Co., 651 F.2d 609 (8th Cir. 1981) 44
Hazelwood School District v. United States,
433 U.S. 299 (1977) 11, 12, 13, 34, 37, 41, 42
Heagney v. University of Washington, 642 F.2d 1157
(9th Cir. 1981) 39
Hill v. Seaboard Coast Line RR. Co., 767 F.2d 771
(11th Cir. 1985) 35

TABLE OF AUTHORITIES (Continued)

Cases Page

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) ..... passim

Johnson v. Transp. Agency, Santa Clara County, California, 480 U.S. ___, 94 L.Ed.2d 615 (1987) 21, 23

Lewis v. Chicago State College, 299 F.Supp. 1357 (N.D. Ill. 1969) 26
Lilly v. City of Beckley, 797 F.2d 191 (4th Cir. 1986) 39

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) ..... passim
Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973) 13
Mortenson v. Callaway, 672 F.2d 822 (10th Cir. 1982) 43

New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) 34
NLRB v. Gullett Gin Co., 340 U.S. 361 (1951) 18

Paige v. Marsh, No. 86-1282 (slip op; available on Lexis) (8th Cir. Feb. 3, 1987) 44
Pattern Makers League v. NLRB, 473 U.S. 95 (1985) 33
Payne v. Travenol Laboratories, Inc., 673 F.2d 798 (5th Cir. 1982) 41, 42
Pouncy v. Prudential Insurance Co. of America, 668 F.2d 795 (5th Cir. 1982) 41, 42, 43, 44, 45

Reed v. Lockheed Aircraft Corp., 613 F.2d 757 (9th Cir. 1980) 41
Robinson v. Union Carbide Corp., 538 F.2d 652 (5th Cir. 1976), *cert. denied*, 434 U.S. 822 (1977) 37
Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590 (2d Cir. 1986) 44, 45
Rowe v. Cleveland Pneumatic Co. Numerical Control, 690 F.2d 88 (6th Cir. 1982) 37, 38, 43
Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972) 37

Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied sub nom. Meese v. Segar*, 471 U.S. 1115 (1985) 43, 46, 47
Smith v. Board of Education of Morrilton School District, 365 F.2d 770 (8th Cir. 1966) 25, 26
Stastny v. Southern Bell Telephone & Telegraph Co., 628 F.2d 267 (4th Cir. 1980) 44

TABLE OF AUTHORITIES (Continued)

Cases Page

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) ..... passim

United States v. Georgia Power Co., 3 FEP Cas. 767 (N.D. Ga. 1971), *aff'd in part and vacated in part*, 474 F.2d 906 (5th Cir. 1973) 30
United States Postal Service Board of Governor v. Aikens, 460 U.S. 711 (1983) 16, 36
United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979) 39

Wang v. Hoffman, 694 F.2d 1146 (9th Cir. 1982) 35
Waters v. Furnco Construction Co., 551 F.2d 1085 (7th Cir. 1977) 13

Zahorik v. Cornell University, 729 F.2d 85 (2d Cir. 1984) 35
Ziman v. USPS, No. 01842595 (July 23, 1986) 33

Statutes and Regulations

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e, *et seq.* .. passim
Section 703(a)(2), 42 U.S.C. 2000e-(2)(a)(2) 18, 26, 41
Section 703(h), 42 U.S.C. §2000e-(2)(h) 10, 11, 20, 28
Section 703(j), 42 U.S.C. §2000e-2(j) 40
Section 706(f), 42 U.S.C. §2000e-f(f)(l) 20
Section 715 31
42 U.S.C. 1981 3
42 U.S.C. 1983 ..... 25, 26
Decision of the EEOC, CCH Empl. Prac. Guide ¶17304.53 (Dec. 2, 1966) 28
Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 ..... 18, 31
Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333 (Aug. 1, 1970) 29, 33
1607.2 29
1607.3 ..... 29, 31
1607.4 - 1607.8 ..... 29, 30
1607.13 ..... 29, 32
Guidelines on Employment Testing Procedures, August 24, 1966 ..... 28, 29

TABLE OF AUTHORITIES (Continued)

Statutes and Regulations Page

Uniform Guidelines On Employee Selection Procedures,
29 C.F.R. 1607 (1978)..... 31, 32, 33
1607.3A 31
1607.6B..... 32
1607.6B(1)..... 32
1607.16Q..... 31
41 Fed. Reg. 51734 (1976)..... 31
43 Fed. Reg. 38291 (1978) 32
44 Fed. Reg. 12002 (1979)..... 32

Legislative History

H.R. 1746..... 19, 20
H.R. 9247 19
H. Rep. No. 238, 92d Cong., 1st Sess. (1972) 22, 23
H.R. Conf. Rep., 92d Cong., 2d Sess. (1972)..... 24
S. 878..... 21
S. 884..... 21
S. 2515..... 20, 21, 23
S. Rep. No. 92-415, 92d Cong., 1st Sess. (1971)..... 20, 22
110 Cong. Rec. 7218 (1964) 40
117 Cong. Rec.
31960 ..... 20, 22
31961 ..... 20, 24
32094..... 24
32095..... 20
32096..... 20
32102..... 20
32104..... 20
32106..... 20
32111 19
118 Cong. Rec.
294 21
296 24
580 21
590 21
944-945..... 21
1815-1816 24
3962 20

TABLE OF AUTHORITIES (Continued)

Legislative History Page

3965-3979 21
4080 20
4081 27
4082 ..... 20, 27
4944 23
6647 26
7166 24
7170 23
7573 23

Other Authorities

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Gold, *Reply to Thomson*, 8 Indus. Rel. L.J. 117 (1986) 18, 26

TABLE OF AUTHORITIES (Continued)

Other Authorities Page

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Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. Chi. L. Rev. 423 (1980) 26

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Note, *The Uniform Guidelines on Employee Selection Procedures: Compromises and Controversies*, 28 Cath. U. L. Rev. 605 (1979) 31

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STATEMENT

In August of 1973, Clara Watson applied for employment at Fort Worth Bank & Trust. (J.A. 5). Although she had no banking experience when she applied for employment, Watson was offered employment by the bank and accepted a position as a proof operator. (J.A. 5, 190). Approximately one year after starting with the bank, Watson was promoted to the position of teller trainee. (J.A. 6 and I Tr. 21). Upon completion of her training, Watson became a teller in the motor bank or drive-in bank. (J.A. 7). She remained in the position of motor bank teller until 1980 when she was promoted to the position of commercial teller and informal assistant to Richard Burt. (I Tr. 47).

Up to 1978, the bank conducted oral evaluations of its employees. The evaluations considered various factors which the bank considered important to its business. (J.A. 8). In 1979, the bank instituted a written evaluation system to evaluate employees. (II Tr. 80). The written evaluation forms were obtained from an outside consultant who performs similar services for other banks.

Beginning in 1979, the bank also adopted a posting procedure whereby job openings in the bank were posted to inform current bank employees of the positions available. (II Tr. 36). An employee who wished to apply for the position would fill out a form or application for promotion to the position. (J.A. 121). The supervisor over the open job position was in charge and had responsibility for interviewing each of the applicants, as well as evaluating the relative qualifications of the applicants. The supervisor would then make his or her best judgment as to which applicant would be given the job. (J.A. 131).

In February 1980, two supervisory positions became open at the bank. Watson was considered for both positions, however, Richard Burt was promoted to supervisor of lobby tell-

ers and Pat Cullar was promoted to supervisor of motor bank tellers. (I Tr. 40).

At the time of his promotion to supervisor of lobby tellers, Burt had experience in the general ledger department, as a credit analyst, as an assistant to Shipp, and as supervisor of the bookkeeping department. (III Tr. 28-29). He received his bachelor of arts degree in banking and finance shortly after his promotion to supervisor of lobby tellers. (III Tr. 28-29).

At the time of Cullar's selection as supervisor of motor bank tellers, she was working as the assistant to the lobby teller supervisor whose place Burt had taken and had obtained valuable supervisory experience. (III Tr. 87). In addition, Cullar had approximately eighteen years experience in banking. (III Tr. 202-204).

In addition to Watson, a white employee who had experience as supervisor of the motor bank tellers was also not selected. Watson acknowledged that she was not as qualified as Gail Leavitt, the white applicant. (I Tr. 147).

Immediately after these supervisor positions were filled, Watson was placed in the informal position as assistant to Burt. (I Tr. 157-158). Watson remained in the position of commercial teller and assistant to Burt until January of 1981. At that time, Watson was required to have foot surgery and took a leave of absence from the bank. (J.A. 18). While Watson was on leave, the positions of motor bank supervisor and lobby teller supervisor both became open again. (J.A. 18). Cullar, the motor bank teller supervisor, who had reported directly to Burt as lobby supervisor, was chosen by Burt to become the new lobby teller supervisor. (III Tr. 31). In choosing Cullar, Burt testified that there were many factors considered in arriving at his decision. Included in these factors were previous supervisory experience, leadership ability and the ability to get along with others. At the time Burt was considering the applicants, he formed an opinion that Cullar was the best qual-

ified candidate to assume the position of supervisor of lobby tellers. Further, Burt testified that he did not consider Watson to be as qualified as Cullar because there had been resentment from other tellers who had been under Watson's direction during the time she acted as his assistant. (III Tr. 33).

Burt testified that in making his decision to select Kevin Brown for the other position he again considered the fact that Watson had demonstrated an inability to get along with others. Burt was of the opinion that Watson did not have the respect nor the leadership ability that Brown possessed. (III Tr. 76). Burt considered the fact that Brown was a good teller, knew the people in the drive-in very well, and was of the opinion that they had respect for him. Burt also considered the fact that Brown had worked as the "lead person" in the afternoon shift in the motor bank. (III Tr. 76). As was the situation with the 1980 promotions, Burt considered a number of applicants before selecting Cullar and Brown. (J.A. 131).

Watson filed suit in the District Court alleging that the bank discriminated against her and other persons similarly situated on the basis of race in violation of 42 U.S.C. §1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* In support of her individual claim, Watson attempted to show that she had been the victim of intentional discrimination in the bank's decisions regarding the four promotions she sought. She also sought to show that the bank's use of a subjective, discretionary procedure for evaluating applicants for promotion resulted in a disparate impact upon her. Although she alleged a claim under both theories, Watson's proof was clearly patterned after the disparate treatment model as described in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The thrust of Watson's case (as supported by her own testimony) was that she had been intentionally denied a promotion on four separate occasions by white supervisors on the basis of her race. (J.A. 45-47).

Although Watson offered certain statistical data concerning blacks and whites with regard to the hiring, promotion, and salary increase practices of the bank, Watson offered no evidence which identified a specific, facially neutral practice of the bank which created an adverse impact upon blacks.

The bank challenged the statistical evidence offered by Watson, pointing out that the hiring data was flawed because Waton's expert had failed to include at least 28 applicants in the data analyzed (II Tr. 183) and that her analyses failed to control for the relative qualifications of the applicants. (II Tr. 186). Likewise, the bank established that Watson's analyses were further flawed because her expert had based all of his analysis upon the dubious assumption that there were always job openings when black applicants sought employment at the bank. (II Tr. 185). Dr. Marshall also admitted that he did not consider the frequency which blacks and non-blacks actually sought promotions. (II Tr. 204). The District Court apparently determined that the statistical evidence offered by Watson was not probative because it found that her statistical evidence did not present a prima facie case of race discrimination. (J.A. 202).

However, with regard to Watson's individual claim, the trial court concluded that Watson had established a prima facie case of individual employment discrimination in that she was a member of a protected class, she applied for and was qualified for the position of lobby supervisor and motor bank supervisor in 1980 and 1981 and that she was not selected. The Court then concluded that the bank had met its burden of proof by articulating legitimate non-discriminatory reasons for each employment decision. The Court finally concluded that Watson failed to establish that the reasons articulated by the bank for choosing Burt, Cullar, and Brown were pretexts for racial discrimination. Accordingly, judgment was entered that Wat-

son take nothing and that her action be dismissed on the merits.

On appeal to the Fifth Circuit, the District Court's judgment rejecting Watson's individual claim was affirmed.

SUMMARY OF ARGUMENT

Petitioner complains that the Court of Appeals refused to examine her employment discrimination claims under the disparate impact model announced by this Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Griggs decision permits utilization of the disparate impact theory *only* when objective, facially neutral tests or requirements are at issue. Petitioner seeks to expand the *Griggs* holding to permit the challenge of not only subjective employment criteria, but also the "bottom line" effect of an employer's subjective employment process.

Eradication of intentional discrimination was the primary goal of Congress when Title VII was adopted. The disparate impact model of proof was crafted by this Court after Title VII was enacted to address employment practices which were neutral in int[illegible] but had a disparate impact upon protected groups. Subsequent opinions of this Court applying the disparate impact model have been careful to follow the distinction between "objective" and "subjective" employment criteria. While this Court has permitted objective employment practices to be tested under both the treatment and impact theories, the Court has refused to extend impact analysis to subjective criteria such as those which are present in this case.

Contrary to the assertions of petitioner, Congress did not mandate that disparate impact analysis should apply to all employment practices when it passed the 1972 amendments to Title VII. Accordingly, the legislative history of the 1972

amendments have little or no relevance to this Court's inquiry in this case.

Petitioner's reliance upon the allegedly consistent view of the government with regard to analysis of subjective employment criteria by application of the disparate impact model is without basis. Contrary to petitioner's assertions to this Court, the position of the EEOC on the issue has changed several times since Title VII was enacted. The current guidelines recognize that certain employment criteria cannot or need not be validated and provide that the employer must only "justify continued use of the procedure[s] in accord with Federal law."

The expansion of *Griggs* sought by petitioner is unwarranted and inappropriate. The disparate treatment model is the only appropriate method for analyzing subjective employment practices of the type utilized by respondent. Disparate impact analysis is only appropriate for analyzing employment criteria which are applied to all applicants mechanically and without exception.

Although as this Court observed in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), both the disparate treatment and disparate impact theories may be applied to a particular set of facts, the theories are not interchangeably applied to all sets of facts. When the employment practices challenged are subjective, the basis of the complaint is that the subjective criteria have been *applied* in a discriminatory fashion. The disparate treatment model provides the only proper framework for analyzing such complaints.

If the position advocated by the petitioner is adopted employers will be faced with the impossible burden of validating all subjective criteria involved in normal personnel decisions. While perhaps it is theoretically possible to validate subjective criteria, practically speaking the economic cost to small employers makes the task impossible. As is demonstrated by the better reasoned opinions of the Court of

Appeals, the disparate treatment model provides an appropriate method for analyzing the application of subjective employment criteria. There is no basis or need to extend disparate impact analysis to subjective criteria.

ARGUMENT

Petitioner presented a case alleging that she was not selected for promotion to four supervisory positions because of her race and further that the bank's use of subjective selection procedures had a disparate impact upon her. The District Court considered fully the statistical and anecdotal evidence presented by both parties and determined that Watson had not met her burden of proof under the disparate treatment model. The Court of Appeals affirmed the trial court's judgment regarding Watson's individual claim. Watson now asks this Court to ignore its previous decisions and to permit her to employ the disparate impact model to attack the bank's use of a selection process which utilizes subjective evaluation of multiple factors for the purpose of selecting the best qualified applicant.

I. The Decisions of This Court Restrict Disparate Impact Analysis to Objective Selection Procedures

The basis for the disparate impact theory of proof is, of course, this Court's opinion in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In *Griggs*, this Court announced that Title VII applied not only to intentional discrimination, but also to an employment practice or selection criterion which is "fair in form, but discriminatory in operation." *Griggs* at 431. At issue in *Griggs* was the employer's requirement that employees have a high school degree and that they pass an aptitude test before they were qualified for promotion. In analyzing Title VII, this Court emphasized that the Act does not command that any person be hired simply because he was formerly the

subject of discrimination or because he is a member of a minority group, rather, what is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification. *Griggs*, 401 U.S. at 431. Petitioner has construed the holding in *Griggs* as a proclamation that disparate impact analysis is the rule rather than the exception in Title VII analysis. Petitioner emphasizes the Court's reference to "practices, procedures, or tests neutral on their face" as referring to any and all employment practices or procedures. However, in *Griggs*, the Court expressly defined the "practices" referred to as the objective, facially neutral requirements of high school degrees and the passing of a general intelligence test.

Petitioner has attempted to expand the holding in *Griggs* by arguing that the *Griggs*' opinion does not expressly limit disparate impact analysis to objective criteria in that there was no distinction made between subjective and objective employment practices in this Court's opinion. While it is true that the terms "subjective" or "objective" were not used to label the specific employer practices being challenged, it is clear that the holding in *Griggs* focused only on the narrow issue of the employer's requirement of a high school diploma and standardized testing requirements.

In enacting Title VII, there is little question that Congress was principally concerned with intentional discrimination.[1] However, this Court construed Title VII to encompass not only intentional discrimination, but also that which is "neutral in terms of intent". *Griggs* at 430. Although this Court did hold that employment practices which were neutral in intent were prohibited if they had a disparate effect upon minorities, noth-

[1] *See* Gold, *Griggs' Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform*, 7 Indus. Rel. L.J. 429, 497-503 (1985).

ing in the opinion would suggest that this Court considered disparate impact analysis appropriate for testing *discretionary* employment practices.[2]

In fact, the Court's narrow analysis of Title VII and its ultimate holding is reflected in the final paragraph of the opinion wherein the Court states:

> Nothing in the Act precludes the use of *testing or measuring procedures*; obviously they are useful. What Congress has forbidden is giving these *devices and mechanisms* controlling force unless they are demonstrably a reasonable measure of job performance. Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins. Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that any *tests* used must measure the person for the job and not the person in the abstract. *Griggs*, 401 U.S. at 436. (Emphasis added).

The distinction between disparate treatment and disparate impact analysis was addressed by this Court in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). The government alleged that the employer had engaged in a pattern or practice of discriminating against minorities in hiring "line drivers". In addition, the government challenged the seniority system established by the collective bargaining agreements between the employer and the union on the basis that the seniority system contained therein had an adverse impact on minorities. In analyzing the alleged dis-

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[2]Contrary to the implication from Petitioner's Brief at 17, the Solicitor General did not advocate application of the disparate impact model to discretionary employment practices. The Solicitor General is misquoted. The final sentence of the quoted portion of the Solicitor General's *Amicus* Brief in *Griggs* states that "*Discriminatory* 'employment practices' – not attitudes – are declared unlawful." Brief of the United States as *Amicus Curiae* at 16, *Griggs v. Duke Power Co.*, October Term, 1970. (Emphasis added).

parity in treatment involving the refusal to recruit, hire, transfer or promote minority group members on an equal basis with whites, this Court applied the disparate treatment analysis set forth in *McDonnell Douglas Corp. v. Green*; *see*, *Teamsters*, 431 U.S. at 335. In holding that the disparate treatment analysis applied to the recruiting, hiring, transferring and/or promoting of minority group members, this Court, by way of footnote, specifically distinguishes disparate treatment from disparate impact:

> Claims of disparate treatment may be distinguished from claims that stress "disparate impact". The latter involved employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. *Teamsters*, 431 U.S. at 335, *see* n.15.

While the Court noted that either theory may be applied to a particular set of facts, it is significant that *Teamsters* specifically distinguished claims which stress disparate impact from claims involving the employer's practices of recruitment, hiring, transferring, and/or promotion of minority group members. The Court made clear that such claims were to be analyzed as under the disparate treatment model.

In considering the government's contentions that the collective bargaining agreement and its seniority system had an adverse impact on minorities, the Court in *Teamsters* had an opportunity to further explore the application of the disparate impact analysis. After reviewing the application of the seniority system, the Court determined that the ultimate effect was that it "locked" minority workers into inferior jobs and perpetuated prior discrimination by discouraging transfers to jobs as line drivers. While the Court determined that the seniority system was protected by Section 7.03(h) as a "bona fide" seniority system, the Court noted that otherwise it

would have fallen within the *Griggs* rationale. The Court stated:

> One kind of practice "fair in form, but discriminatory in operation" is that which perpetuates the effects of prior discrimination. As the Court held in *Griggs*: "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices. (Citations omitted).
>
> Were it not for Section 7.03(h) the seniority system in this case would seem to fall under the *Griggs* rationale. *Teamsters*, 431 U.S. at 349.

It was the seniority systems' effect of segregating minority employees in the less desirable jobs, and otherwise adversely impacting minorities, which caused the Court to conclude it would be subject to disparate impact analysis. As in *Griggs*, the seniority system created an artificial barrier to advancement by members of a protected class. As the Court in *Teamsters* observed, with regard to claims of discriminatory hiring practices, the "controlling legal principals are relatively clear." *Teamsters* at 334-35. The disparate treatment model was held to be appropriate for analyzing such practices, not impact analysis. Contrary to petitioner's view of *Teamsters*, the seniority system was not the only employment practice at issue. This Court was also faced with a direct challenge of a largely subjective employment system which resulted in a racial imbalance, just as were Watson's allegations here. This Court held that it was clear that such claims should be analyzed under the disparate treatment model. That same "relatively clear" legal principal was properly used to analyze Watson's claims.

Petitioner relies on *Hazelwood School District v. United States*, 433 U.S. 299 (1977). However, petitioner's suggestion that *Hazelwood* is authority for the application of disparate

impact analysis to subjective criteria is incorrect. *Hazelwood* is authority for application of a "pattern or practice" test to Watson's claim, which is of course an analysis for disparate treatment, not disparate impact. As petitioner correctly observes, the facts of *Hazelwood* are very similar to those at hand, and the claim asserted by Watson was properly tested under the disparate treatment model.

That *Hazelwood* is authority for application of disparate treatment analysis to employment practices which grant to supervisory personnel "virtually unlimited discretion"[3] to evaluate applicants for promotions based upon numerous intangible criteria, is further borne out by this Court's opinion in *Dothard v. Rawlinson*, 433 U.S. 321 (1977). Decided the same day as *Hazelwood*, *Dothard* applied disparate impact analysis to certain minimum height and weight requirements. In *Dothard*, the Court again took pains to distinguish the facially neutral employment standards at issue from the cases where proof of intent was required. The Court stated:

> The gist of the claim that the statutory height and weight requirements discriminate against women does not involve an assertion of purposeful discriminatory motive. It is asserted, rather, that these facially neutral qualification standards work in fact disproportionately to exclude women from eligibility for employment with the Alabama Board of Corrections. We dealt in *Griggs v. Duke Power Co.* and *Albemarle Paper Co. v. Moody* (citations omitted), with similar allegations that facially neutral employment standards disproportionately excluded Negroes from employment, and those cases guide our approach here. *Dothard*, 433 U.S. at 328-29.

It is significant that *Hazelwood* was not one of those cases which the Court mentioned as guiding its consideration of the height and weight requirements at issue in *Dothard*. Decided by this Court on the same day, *Dothard* and *Hazelwood* distin-

[3] *Hazelwood School District v. United States*, 433 U.S. 299 at 302 (1979).

guish this Court's application of disparate impact analysis to the objective employment standards present in *Dothard* from disparate treatment analysis of the essentially subjective employment practices utilized in *Hazelwood*. Although this Court did not engage in characterizing the practice as "objective" versus "subjective", it seems clear from the facts in *Dothard* that the employer practice in question is clearly objective.[4]

In *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), this Court once again distinguished between disparate treatment and disparate impact analysis. Petitioner has represented to the Court on page 23 of her Brief that the Court of Appeals concluded that Furnco's policy of not hiring at the gate was racially neutral on its face, but that there was no showing that the policy had a disparate impact or effect. However, petitioner's assertion is incorrect. Rather, in applying the narrow holding of *Griggs*, the Court of Appeals stated:

> As we understand the *Griggs*' principle, it provides a method for establishing the presence of discrimination where application of a test of a group of employees or applicants results in a proportionately higher rate of rejection of members of a minority group. Here the reliance upon the superintendent's recollection of brick layers he considered competent was not a test or device for comparing the members of a group of prospective employees, where there was no defined group. . . .
>
> This was not a case, like *Griggs*, of comparing white or black applicants by *objective*, but irrelevant standards, in rejecting more blacks, proportionately, than white. (Emphasis added). *Waters v. Furnco Construction Corp.*, 551 F.2d 1085 at 1089-90 (7th Cir. 1977).

[4] *Dothard* further relies on *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) in support of its disparate impact analysis. *Albemarle* involved a class action brought by black employees who challenged a job seniority system and the requirement of employment testing conducted by standardized written test. (Objective criteria). *See Moody v. Albemarle Paper Co.*, 474 F.2d 134 (4th Cir. 1973).

This Court agreed with the Court of Appeals that the proper approach was the analysis contained in *McDonnell Douglas* (disparate treatment). *Furnco*, 438 U.S. at 575. In a supporting footnote, this Court noted that:

> This case did not involve employment tests, which we dealt with in *Griggs v. Duke Power Co.* And in *Albemarle Paper Co. v. Moody*, for particularized requirements such as the height and weight specifications considered in *Dothard v. Rawlinson*, and it was not a "pattern and practice" case like *Teamsters v. United States*. (All citations omitted). *Furnco*, 438 U.S. at 575 n. 7.

Petitioner tries to down play the significance of footnote 7 of *Furnco* by claiming that the footnote is simply a reiteration of the disparate impact cases decided by the Court as of that date. However, the footnote supports the single sentence holding of the Court that the proper approach in *Furnco* is the disparate treatment analysis of *McDonnell Douglas v. Green*. It seems highly improbable that the Court, after holding that the disparate treatment analysis applies, would support that holding with a footnote reiterating the various disparate impact cases which it had decided. It seems obvious that footnote 7 was added to distinguish between the factual situations which require disparate treatment analysis and those where disparate impact analysis is appropriate.

A few years later, in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), this Court explained the basic allocation of burdens and order of presentation approved in a disparate treatment case under *McDonnell Douglas Corp. v. Green*. *Burdine*, 450 U.S. at 252. Nowhere in *Burdine* does the Court focus on disparate impact analysis, rather, the Court clearly indicates that the respondent's Title VII claim was properly analyzed under disparate treatment theory. *Burdine* alleged that the failure to promote her and

the subsequent decision to terminate her had been predicated on gender discrimination in violation of Title VII.

The significance of this Court's application of the disparate treatment analysis to the facts in *Burdine* becomes more significant in light of this Court's application of the disparate impact analysis to the facts in *Connecticut v. Teal*, 457 U.S. 440 (1982). The plaintiffs alleged that the employer violated Title VII by imposing, as an absolute condition for consideration for promotion, that applicants pass a *written test* that excluded blacks in disproportionate numbers and that it was not job related. *Teal*, 457 U.S. at 444. The employer asserted a "bottom line" result defense in that the overall result of the selection process showed that a greater percentage of blacks were promoted.

This Court, in its majority opinion, concluded that the employees' claim should be analyzed under the disparate impact analysis of *Griggs*. In so holding, the majority consistently focuses on the fact that the case concerns a specific, facially neutral employment test that allegedly had a disparate impact on minorities.

Petitioner misconstrues *Teal* by asserting that the majority and the dissent agree that the disparate impact approach includes examination of the entire range of employee selection devices. The references of the dissent to the "total selection process" clearly relate to the majority's rejection of the "bottom line" defense asserted by the employer. The dissent is not suggesting that disparate impact analysis can be applied to a multiple component employment selection process. *Teal* demonstrates this Court's consistent limitation of the *Griggs* test to objective requirements and tests and that an employer will not be permitted to raise a "bottom line" defense to defeat a prima facie case of disparate impact. *Teal* is not to be read as an expansion of *Griggs*. As the majority holds, disparate impact analysis is not applied to the employer's entire selec-

tion process, but is only applied to distinct requirements and tests within the selection process.

Perhaps this Court's decision which is closest to the facts of the case at hand is *United States Postal Service Board of Governor v. Aikens*, 460 U.S. 711 (1983). *Aikens* involved an individual claim that the employer had discriminatorily refused to promote. In *Aikens*, the plaintiff showed that white employees consistently received promotions over him and other black employees, and that he was better qualified than the white who was selected for promotion in all but one instance. The plaintiff also introduced evidence showing that the person who was responsible for the promotion decisions had made numerous derogatory comments about blacks in general and the plaintiff in particular. *Aikens* at 713. These facts are quite similar to those which Watson claims to have established in support of her individual claim.

The Court left no doubt that the *McDonnell Douglas/Burdine* model should be applied to the Plaintiff's claim:

> We have consistently distinguished disparate-treatment cases from cases involving facially neutral employment standards that have disparate impact on minority applicants. *See, e.g. Texas Department of Community Affairs v. Burdine*, 450 US 248, 252, n5, 67 L Ed 2d 207, 101 S Ct 1089 (1981); *McDonnell Douglas Corp. v. Green*, 411 US 792, 802, n 14, 36 L Ed 2d 668, 93 S Ct 1817 (1973). *Aikens* at 713.

Although the Court does not expressly so state, it seems obvious that disparate treatment analysis was appropriate because of the subjective criteria involved in the employment selections challenged. The exercise of discretion in choosing one applicant over another is not a facially neutral employment standard which may be tested by impact analysis. On the contrary, a claim that one was preferred over a minority employee as a result of a subjective interview process, where

the employer exercises discretionary judgment to chose the applicant best qualified, will always be a claim that the minority applicant was the victim of intentional racial discrimination.

An examination of this Court's decisions following *Griggs*, and those which distinguish *Griggs*, clearly demonstrate that subjective employment practices are not appropriate for disparate impact analysis. As Justice Brennan acknowledged in *Teal*, disparate impact analysis tests for discrimination which arises from facially neutral policies, while disparate treatment involves facially discriminatory policies. *Teal* at 455.

Watson complains of separate decisions made by different members of the bank's supervisory staff. She says that her nonselection was due to the bank's consideration of her race. There is little question that her position before the trial court was that she was the victim of intentional discrimination. After she could not satisfy her burden of proof to make a case of disparate treatment, she now attempts to characterize the bank's selection procedures as the same type involved in *Griggs* and its progeny. But as *Griggs* and those decisions of this Court following it have shown, the bank's evaluation process for determining which of several applicants is to receive a particular promotion is not the kind of facially neutral requirement or test which is appropriate for disparate impact analysis. Watson cannot point to any specific criteria which causes the disparate impact, but acknowledges that the bank relied upon numerous factors in its decisions. Watson's claim was properly tested under the *McDonnell Douglas/Burdine* model in that she was afforded a full and fair opportunity to convince the trier of fact that the bank's actions were motivated by intentional discrimination because of her race. The decisions of this Court offer no basis for now analyzing her claim under the disparate impact model. While the decisions of the Court do not refer by name to the distinction between claims which involve subjective selection criteria and those

which involve objective criteria, a review of the Court's decisions clearly demonstrates that the Court has consistently limited disparate impact analysis to those claims where objective, facially neutral selection criteria were present.

II. The Legislative History of the 1972 Amendments to Title VII Does Not Support Application of Disparate Impact Analysis to Subjective Selection Criteria

Petitioner and her *amici* contend that the legislative history of the 1972 amendments to Title VII shows that Congress mandated that the *Griggs* rule should apply to all employment practices, including subjective ones.[5] Specifically, they point to (1) the references in the legislative history to "systemic" or "institution" discrimination, (2) the concern with discriminatory practices by governmental employers, particularly those of the Civil Service Commission, and (3) Congress's asserted ratification of the result of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and of the pre-1972 case law on employment discrimination. These contentions are demonstrably incorrect.

Before examining the legislative history in detail, a basic preliminary point must be made. In 1972, Congress simply did not amend any of the provisions relevant to this case. *See* the Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103. The specific provision at issue in this case, Section 703(a)(2), was amended only to add the words "or applicants for employment." This change does not suggest an intent to codify *Griggs*; still less does it suggest an intent to extend the coverage of *Griggs* to subjective practices. *See* Gold, *Reply to Thomson*, 8 Indus. Rel. L. J. 117, n.4 (1986). If Congress has re-enacted Title VII in 1972, such a decision might have signified an endorsement of existing judicial and administrative glosses on the statute. *Cf. NLRB v. Gullett Gin Co.*,

[5] *See* Brief for Petitioner 35-38; Brief for the NAACP Legal Defense and Educational Fund, Inc. *et al.*, 13-20; Brief for the Lawyers' Committee for Civil Rights Under Law 9-10.

340 U.S. 361, 365-366 (1951). But Congress did *not* reenact the statute. Thus, since the statutory language governing this case "was enacted in 1964, not 1972," and since "[t]he views of members of a later Congress, concerning different sections of Title VII, are entitled to little if any weight," it is the intent of the Congress that enacted Section 703(a) in 1964 that controls. *Teamsters v. United States*, 432 U.S. 324, 354 n. 39 (1977). Any debate about the intent of the 1972 Congress is therefore really academic.

Assuming, *arguendo*, that the 1972 legislative history has some relevance to this case, petitioner and her *amici* in any event misinterpret it. That history reveals no intent whatever to extend *Griggs* to subjective practices. If anything, it shows that Congress looked with favor on administrative enforcement of the aims of Title VII through disparate *treatment* litigation, *i.e.*, pattern-or-practice suits.

The genesis of the 1972 amendments, as relevant here, was as follows. A bill designated H.R. 1746 was introduced by Cong. Augustus Hawkins and reported out unchanged by the House Committee on Labor and Education. The Hawkins bill was turned down in a floor vote in favor of the "Erlenborn substitute," H.R. 9247, a measure introduced by Congressman John N. Erlenborn as an alternative to the Hawkins bill. See 117 Cong. Rec. 32111.[6]

During the House floor debate on September 14-15, 1971, several supporters of the Hawkins bill referred in their remarks to "systemic" or "institutional" discrimination. Congressman Perkins, who chaired the House committee, spoke to that issue in his introductory remarks on September 14; however, he clearly linked the existence of such discrimination to the need to give broader enforcement and litigation authority to the Equal Employment Opportunity Commission

[6]Petitioner seems to imply, mistakenly, that the Hawkins bill passed the House. *See* Brief for Petitioner 36.

(EEOC), which under the 1964 Act had only conciliatory and persuasive powers.[7] Congressman Perkins did not suggest that *Griggs* should be extended to cover these employment practices. *See* 117 Cong. Rec. 31960. Nor did other supporters of H.R. 1746 who raised the issue of institutional discrimination; they advocated the same solution as Congressman Perkins's, *i.e.*, they sought to empower the EEOC to issue cease and desist orders, and to initiate litigation. *See* 117 Cong. Rec. 32095 (remarks of Del. Fauntroy); *id.* at 32096 (remarks of Cong. Eckhardt); *id.* at 32102 (remarks of Cong. Badillo); *id.* at 32104 (remarks of Cong. Fraser); *id.* at 32106 (remarks of Cong. Stokes).[8]

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[7]Prior to the 1972 amendments, the only civil actions authorized by the statute were private lawsuits or "pattern-or-practice" actions brought by the Attorney General. The EEOC's role in eliminating employment discrimination was limited chiefly to conciliation and persuasion. As a result of the 1972 amendments, authority to bring "pattern or practice" cases was transferred to the EEOC, except in cases where the defendant was a governmental entity. See Section 706(f)(1), 42 U.S.C. 2000e-f(f)(1). As the Court has said, "Congress became convinced * * * that the 'failure to grant the EEOC meaningful enforcement powers has proven to be a major flaw in the operation of Title VII.' []S. Rep. No. 92-415 p. 4 (1971). The 1972 amendments to Section 706 accordingly expanded the EEOC's enforcement powers by authorizing the EEOC to bring a civil action in federal district court against private employers reasonably suspected of violating Title VII." *General Telephone v. EEOC*, 446 U.S. 318, 325 (1980) (footnote omitted). *See, also, e.g.*, 118 Cong. Rec. 3962 (remarks of Sen. Javits) ("the price of the Civil Rights Act of 1964 was a very weak job discrimination title"); *id.* at 4080 (remarks of Sen. Williams) (to like effect); *id.* at 4082 (remarks of Sen. Javits).

[8]One provision of the rejected Hawkins bill would have amended Section 703(h) of Title VII insofar as that section provides that "it shall not be an unlawful employment practice * * * for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate * * *." Congressman Perkins explained that the proposed amendment to Section 703(h) was designed to "alter[] the language of Title VII better to reflect the congressional intent as interpreted by the Court in the *Griggs* case." 117 Cong. Rec. 31961. The proposed amendment was defeated together with the rest of the Hawkins bill; there were no comments on it other than Congressman Perkins's. No parallel provision appeared in S. 2515, the Senate bill sponsored by Senator Williams. While

The substantive provision of the Senate bill introduced by Senator Williams, S. 2515, were similar in relevant respects to those of the Hawkins bill;[9] in particular, S. 2515 would have conferred cease and desist powers on the EEOC – a measure both houses ultimately rejected.[10] In the Senate debate, as in the House debate, those who spoke of institutional discrimination also urged expanded EEOC authority, not the extension of *Griggs*, as an antidote to the problem. Senator William's introductory remarks on his bill were similar in tenor to Congressman Perkins's introductory remarks on the Hawkins bill in the House. *See* 118 Cong. Rec. 294 (remarks of Sen. Williams). Other Senators who spoke of institutional discrimination likewise envisaged EEOC enforcement authority as the cure. *See id.* at 580 (remarks of Sen. Javits); *id.* at 590 (remarks of Sen. Humphrey); *id.* at 944-945 (remarks of Sen. Spong) (opposing Williams bill, but urging EEOC be given authority to litigate); *id.* at 3978 (remarks of Sen. Moss) (supporting Williams-Javits position).[11]

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it may be hazardous to draw any inferences from such Congressional inaction, *see Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. _____, 94 L.Ed.2d 615 (1987) (Scalia, J., dissenting), certainly the result does nothing to support the view that the 1972 Congress codified or ratified *Griggs*.

[9]*But see* n.8, *supra*.

[10]Petitioner states, not entirely accurately, that the Williams bill was "ultimately enacted." *See* Brief for Petitioner 35. In this crucial respect, however, the original Williams bill survived only as amended. Both supporters and critics of the Williams bill regarded the conferral of cease and desist powers on the EEOC as one of its key provisions. *See, e.g.*, 118 Cong. Rec. 3965-3979; Thomson, *The Disparate Impact Theory: Congressional Intent in 1972 – A Response to Gold*, 8 Indus. Rel. L. J. 105, 109 (1986) ("[t]he main struggle in both houses of Congress concerned whether the EEOC would have power to issue cease and desist orders"). Nevertheless, the Senate ultimately passed an amendment by Senator Dominick, S. 884, that denied such enforcement power to the EEOC, and required it to initiate litigation in a federal district court. *See* 118 Cong. Rec. 3979.

[11]*See* 118 Cong. Rec. 3965 (colloquy between Sens. Dominick and Javits) (describing differences between S. 884, the Dominick amendment, and S. 878, the Williams-Javits proposal to which Sen. Moss spoke).

The same perceived deficiency in Title VII, and the same proposed cure, were discussed at length in the Report of the Senate Committee on Labor and Public Welfare, S. Rep. 92-415, 92nd Cong., 1st Sess. 4-5 (1971). (The Report was attached to the original, unamended Williams bill). In a section entitled "Need For The Bill," the Report states (*id.* at 12) that:

> [i]n 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. * * * Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of 'systems' and 'effects' rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements.

See also H. Rep. No. 238, 92d Cong., 1st Sess. 21-22 (1972) (attached to the Hawkins bill). The statements immediately preceding this reference to "systems" and "effects," however, make clear that the Senate Committee's solution was to change the role of the EEOC from an agency devoted to voluntary conciliation efforts, to an agency that, like the National Labor Relations Board or the Securities and Exchange Commission,[12] could issue cease and desist orders (*id.* at 11):

> The most striking deficiency of the 1964 Act is that the EEOC does not have the authority to issue judicially enforceable orders to back up its findings of discrimination. In prohibiting discrimination in employment based on race, religion,, color, sex or national origin, the 1964 Act limited the Commission's enforcement authority to

[12] *See, e.g.*, 117 Cong. Rec. 31960 (remarks of Cong. Perkins) (drawing comparison to cease and desist powers of other agencies).

> 'informal methods of conference, conciliation and persuasion.' * * * This failure to grant the EEOC meaningful enforcement powers has proven to be major flaw in the operation of Title VII. While the statutes dealing with discrimination in housing and in education provide appropriate enforcement powers for the agencies responsible for the elimination of discrimination in those areas of the law, Title VII, as it now stands, is little more than a declaration of national policy. Regretably [sic], the practices and policies of discrimination are so deeply ingrained that the voluntary conciliation approach has not succeeded in adequately combating the existence of such practices.

On February 22, 1972, the Senate passed the amended S. 2515. 118 Cong. Rec. 4944. The differences between the House and Senate bills were resolved in conference, and the final version, as reported from the conference, was ratified by both houses. 118 Cong. Rec. 7573 (House); *id.* at 7170 (Senate).

Petitioner's *amici* further argue that the expansion of Title VII's coverage in 1972 to include governmental employers also evidences an intent to extend *Griggs* to subjective decisionmaking.[13] But this Court pointed out in *Johnson v. Transp. Agency, Santa Clara Cty.*, 480 U.S. ____ , 94 L.Ed.2d at 628 "[w]hile public employers were not added to the definition of 'employer' in Title VII until 1972, there is no evidence that this mere addition to the definitional section of the statute was intended to transform the substantive standard governing employer conduct. Indeed, 'Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike'" (citing *Dothard v. Rawlinson*, 433 U.S. 321, 323 n. 14 (1977)). Consequently, the broader post-1972 coverage of Title VII does not suggest that Congress altered the pre-1972 substantive standards for determining the lawfulness of subjective practices.

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[13] *See* Brief for the NAACP Legal Defense and Educational Fund, Inc., *et al.* 15-17.

The legislative record bears out this conclusion. The references in the floor debates to practices by governmental employers that had racially disparate effects were intertwined with the argument that extending Title VII's protections to governmental employees would bring the necessary relief. *See, e.g.*, 118 Cong. Rec. 296 (remarks of Sen. Williams); *id.* at 1815 (remarks of Sen. Williams) (introducing into the record a 1969 report of the U.S. Commission on Civil Rights on which petitioner relies (Brief for petitioner 35-36)). Senator Williams did *not* argue that impact theory had to be applied across the entire range of governmental – and hence private – employment procedures. He said instead that "[t]he inclusion of State and local government employees within the jurisdiction of Title VII will fulfill the congressional duty to enact the 'appropriate legislation' to ensure that all citizens are treated equally in this country" (118 Cong. Rec. 1816). In other words, Senator Williams apparently believed that the extension of Title VII's protections to government workers would *in itself* be an adequate remedy for the abuses pointed out in the Report of the Commission on Civil Rights.[14]

Nor do the statements in the 1972 legislative reports, to the effect that then-developed case law would continue to govern Title VII, prove that Congress intended *Griggs* to apply to subjective practices. *See* H.R. Conf. Rep., 92nd Cong., 2d Sess., reprinted in 118 Cong. Rec. 7166 (1972).

First, this Court has repudiated excessive reliance on pre-1972 lower Court decisions as a basis for interpreting Title

[14]Other speakers emphasized that the problems in the federal civil service would be corrected by empowering the EEOC, rather than the Civil Service Commission, to take antidiscriminatory measures. *See* 117 Cong. Rec. 32094 (remarks of Del. Fauntroy); *id.* at 31961 (remarks of Cong. Perkins). Congressman Perkins added that it was also expected that the Civil Service Commission would continue its own "affirmative measures" against federal employment discrimination. *Id.* These remarks (which in any case were addressed to the unsuccessful Hawkins bill) also fall far short of the claim that *Griggs* was to be extended to subjective practices in both governmental and private employment.

VII. Thus, in *Teamsters v. United States*, 431 U.S. 324, the Court considered and rejected the argument that the 1972 amendments had codified all prior Title VII cases that had struck down good faith seniority systems. And, in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 582 n. 15 (1984), the Court again rejected the "contention that Congress intended [in 1972] to codify all existing Title VII decisions * * *."

Furthermore, none of the pre-1972 cases, including *Griggs*, had settled the issue whether subjective practices with adverse impact on protected groups had to have a "manifest relation" to the job in order to avoid breaching Title VII. "[I]t may be said with confidence that there is nothing either in the facts of [*Griggs*] * * * or in the language of the opinion[] that could serve as authority for extending [its] requirements beyond objective tests and other objective measures such as educational requirements . . ." 3A A. Larson & L. Larson, *Employment Discrimination* para. 76.30 at 15-81 (1987).

Finally, there was pre-1972 case law (in the form of suits against public employers under the Fourteenth Amendment or 42 U.S.C. 1983) holding that some subjective decisionmaking was shielded from such testing.[15] In *Smith v. Bd. of Educ. of Morrilton Sch. Dist.*, 365 F.2d 770, 781-782 (8th Cir. 1966), then Judge Blackmun wrote that "teaching is an art and that excellence does not depend upon knowledge, experience, formal training and classroom conduct alone. Fitness for teaching rests upon a broad range of factors and encompasses numerous personality and character traits. * * * Nothing contained in this opinion is intended to be restrictive of a school board's freedom to make a full inquiry and to give due consid-

[15]Although these cases were not decided under Title VII, their relevance to the 1972 amendments is clear. *See Allen v. City of Mobile*, 466 F.2d 122, 125-126 (5th Cir. 1972) (Goldberg, J., dissenting) (noting that prior to 1972 amendments, Section 1983, as applied to governmental employees, had "strong analogy" to Title VII).

eration to an applicant's qualifications so long as the board does not act unreasonably, arbitrarily, capriciously or unlawfully." *Id.* at 632-633. See also *Lewis v. Chicago State College*, 299 F. Supp. 1357 (N.D. Ill. 1969) (to like effect in Section 1983 case). If Congress codified (or even approved) existing case law, it presumably also codified (or approved) *Smith*, *Lewis* and similar employment discrimination decisions, and so has arguably ratified a "reasonableness" test for at least some subjective decisionmaking.

Similar arguments undercut petitioner's reliance on the Court's statement in *Connecticut v. Teal*, 457 U.S. 440, 447 n. 8 (1982), that the legislative history of the 1972 amendments "demonstrates that Congress recognized and endorsed the disparate-impact analysis employed by the Court in *Griggs*."[16] The *Teal* footnote does not suggest that Congress actually codified *Griggs* (as opposed to just endorsing it). Furthermore, Congress's approval of *Griggs* would not assist in the resolution of this case, which unlike *Griggs* concerns subjective, not objective, processes. And in any event, as *amici* concede,[17] the Court has placed little or no weight on the 1972 legislative history where the relevant statutory language - in this case, that of Section 703(a)(2) – was unaffected by the

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[16]*See* Brief for Petitioner 35; *see also* Brief for the NAACP Legal Defense and Educational Fund, Inc. *et al.* 14.

We note, however, that some commentators consider Congress's response to *Griggs* to have been more ambiguous. *See* Gold, *Reply to Thomson*, 8 Indus. Rel. L. J. 117-119; Meltzer, *The Weber Case: The Judicial Abrogation of the Antidiscrimination Standard in Employment*, 47 U. Chi. L. Rev. 423, 436-437 (1980). Thus, *e.g.*, a Senate proposal to strike the word "intentionally" from the remedial provision of Title VII, Section 706(g), was deleted at the insistence of the House, so that the 1964 wording was retained. *See* 118 Cong. Rec. 6647 (Joint Explanatory Statement of Managers at the House-Senate Conference); Sape and Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 Geo. Wash. L. Rev. 824, 883-884 (1972). *See also* n.8, *supra*.

[17]*See* Brief of the NAACP Legal Defense and Educational Fund, Inc., *et al.*, 14 n. 12.

amendments. *Cf. Teamsters v. United States*, 431 U.S. at 354 n. 39.

In sum, petitioner and her *amici* err in reliance on the 1972 legislative record. Congress simply did not deal with the issue of subjective employment practices in any of its actual enactments. Indeed, the fact that the 1972 amendments confer authority on the EEOC to bring pattern-or-practice suits suggests that, contrary to petitioner's thesis, Congress envisaged that disparate *treatment* litigation of that form would be a large part of the answer to the problem of "institutional" discrimination.[18] If the 1972 legislative history is relevant at all, then, it tends to demonstrate exactly the opposite of petitioner's view.

III. Administrative Interpretation Has Not Been Consistent Regarding Application of Subjective Employee Selection Procedures to Disparate Impact Analyses

Petitioner urges (Pet. Br. 20-21, 24, 29-34) that the Court defer to what she claims has been the consistent view of the government – advocated since Title VII's enactment in 1964 – that the disparate impact analysis and its corollary manifest relation/business necessity requirement apply to subjective selection processes. But petitioner overstates the consistency with which the government has adhered to this view and, per-

[18]Senator Javits stressed the importance of the statutory change transferring to the EEOC the power to initiate pattern-or-practice suits against private employers. "By our decision yesterday we gave the EEOC the power to bring suit in big as well as small cases. * * * I have said on a number of occasions in this debate that [the Civil Rights Act of 1964] was a compromise and that much was given up, especially in respect of seeking a remedy against discrimination in employment. * * * That is why we felt we had to give the Attorney General the power to sue in big cases, in class action cases, and in cases where there was a constant pattern of discrimination directed at individuals with limited resources whom we were relegating to the courts and who could hardly be expected to carry such a broad and deep case. We are now changing that and giving it back to the Commission." 118 Cong. Rec. 4081-4082. *See also id.* at 4081 (remarks of Sen. Williams).

haps more importantly, mischaracterizes the views of the government, including the EEOC, today.

Contrary to petitioner's suggestion, the EEOC has not consistently interpreted Title VII as prohibiting use of subjective selection processes that have an adverse impact and that have not been proven manifestly necessary to the job or other business need. In fact, it appears that the EEOC initially took the position that "discrimination" based on educational qualifications (of the kind later at issue in *Griggs*) did *not* violate Title VII. *See* Opinion Letter, dated October 2, 1965, GC 296-65, cited at Pet. App. 147b, in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Thereafter, the EEOC took notice of the fact that objective tests might to used to exclude qualified minority applicants. *See Guidelines on Employment Testing Procedures*, August 24, 1966. Accordingly, it issued guidelines advocating that employers refrain from using such tests wherever they would have the effect of perpetuating past discrimination and were not job-related. *See id.; see also* Decision of the EEOC, CCH Empl. Prac. Guide ¶17304.53 (Dec. 2, 1966). But the guidelines were directed exclusively to the meaning of the phrase "professionally developed ability test[s]" that appears in Section 703(h) of the statute (42 U.S.C. 2000e-7(h)).[19] They were *not* addressed to other kinds of selection devices or employment practices, objective or subjective.

To be sure, the 1966 Guidelines did advocate the use of nondiscriminatory "total personnel systems." But they did not, as petitioner suggests (Pet. Br. 20), state or imply that such personnel systems in their entirety – or, for that matter, any single component of them – had to be formally validated. Rather, the Guidelines advocated that test results not *alone* determine an employer's personnel choices, at least not where other factors suggested that minority group applicants would be

[19]The origin of the 1966 Guidelines is discussed (by an EEOC official who was instrumental in creating them) in Blumrosen, *Strangers In Paradise: Griggs v. Duke Power Co. And The Concept of Employment Discrimination*, 71 Mich. L. Rev. 59, 60-61 nn.5-7 (1972).

successful employees. Indeed, where the 1966 Guidelines did mention a practice that is ordinarily considered subjective (*i.e.*, interviews), they did not propose that that practice be formally validated. Instead, they stressed the desirability of finding interviewers whose racial attitudes were likely to be free from subjective biases.

It was only in 1970 that the EEOC extended its guidelines specifically to cover subjective selection processes and to require that those processes, like objective selection practices, be validated or otherwise formally substantiated. *See Guidelines on Employee Selection Procedures*, 35 Fed. Reg. 12333 (Aug. 1, 1970). Thus, in Section 1607.3 of the 1970 Guidelines, the EEOC defined "discrimination" to include "any test which adversely affects hiring, promotion, transfer or any employment or membership opportunity of classes protected by Title VII * * * unless * * * the test has been validated and evidences a high degree of utility * * *" (*id.* at 12334). The concept of a "test" was then explained in Section 1607.2 to encompass "any paper-and-pencil or performance measure used as a basis for any employment decision," including "scored interviews, biographical information blanks, interviewers' rating scales, [and] scored application forms" (*ibid.*), and Sections 1607.4 though 1607.8 described a single standard for demonstrating the validity of all of these selection devices (*see id.* at 12334-12336). Finally, Section 1607.13 noted that "[s]election techniques other than tests, as defined in §1607.2, may be improperly used so as to have the effect of discriminating against minority groups" and that these "techniques include, but are not restricted to, unscored or casual interviews and unscored application forms" (*id.* at 12336). In such circumstances, Section 1607.13 provided (*ibid.*) that the employer

> * * * may be called upon to present evidence concerning the validity of his unscored procedures as well as of any tests which may be used, the evidence of validity being of

> the same types referred to in §§ 1607.4 and 1607.5. Data suggesting the possibility of discrimination exist, for example, when there are differential rates of applicant rejection from various minority and nonminority or sex groups for the same job or group of jobs or when there are disproportionate representation of minority and nonminority or sex groups among present employees in different types of jobs. If the person is unable or unwilling to perform such validation studies, he has the option of adjusting employment procedures so as to eliminate the conditions suggestive of employment discrimination.

The EEOC's Guidelines were in effect from 1970 to 1978. During that period, however, the Department of Labor, the Department of Justice, and the Civil Service Commission were operating under anti-discrimination and employment testing regulations that differed in many critical respects.[20] Moreover, courts and commentators became increasingly critical of the EEOC's Guidelines, charging that they imposed professionally unrealistic and effectively unattainable requirements on employers and that they vested government prosecutors with excessive and uncontrolled authority to restrict private and public employment practices.[21] Accord-

[20] *See Douglas v. Hampton*, 512 F.2d 976, 961-962 & n.37 (D.C. Cir. 1975) (noting apparent inconsistencies); *see also* Note, *Application of the EEOC Guidelines to Employment Test Validation: A Uniform Standard for Both Public and Private Employers*, 41 Geo. Wash. L. Rev. 505, 527 & nn. 138-139 (1973). The various problems that arose as a result of these inconsistent regulatory frameworks are discussed in *Comptroller General of the United States, Report to the Congress: Problems With Federal Equal Employment Opportunity Guidelines On Employee Selection Procedures Need to Be Resolved* 12-17 (1978); Comment, *Courts, Psychologists, And The EEOC's Uniform Guidelines: An Analysis Of Recent Trends Affecting Testing As A Means Of Employee Selection*, 36 Emory L. J. 203, 219 (1987).

[21] *See, e.g., Albermarle Paper Co. v. Moody*, 422 U.S. 405, 449 (1975) (Blackmun, J., dissenting); *United States v. Georgia Power Co.*, 3 FEP Cas. 767, 787 n.8 (N.D. Ga. 1971), *aff'd in part and vacated in part*, 474 F.2d 906 (5th Cir. 1973); Booth & MacKay *Legal Constraints on Employment Testing and Evolving Trends in the Law*, 29 Emory L. J. 121, 125 (1980); *see also* Gold, *"Griggs'" Folly: An Essay on the Theory, Problems, and Origin of*

ingly, the EEOC joined with these other agencies in rethinking the principles that underlay the extant standards governing employee selection procedures.[22]

The upshot of these inter-agency deliberations was the promulgation of the Uniform Guidelines On Employee Selection Procedures, 29 C.F.R. 1607, to which all four agencies, including the EEOC, are signatories. These Guidelines provide that the "use of any selection procedure which has an adverse impact on * * * employment * * * opportunities of members of any race, sex, or ethnic group will be considered to be discriminatory * * * *unless* the procedure has been validated * * * *or* the provisions of Section 6 [of the Guidelines] * * * are satisfied" (29 C.F.R. 1607.3A (emphasis added). Moreover, they state that a "selection procedure" includes [a]ny measure, combination of measures, or procedure used as a basis for any employment decision[s] * * * includ[ing] the full range of assessment techniques from traditional paper and pencil tests * * * through informal or casual interviews and unscored application forms" (29 C.F.R. 1607.16Q). Section 6 of the Uni-

the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform, 7 Indus. Rel. L. J. 429, 459 (1985); Lerner, *"Washington v. Davis": Quantity, Quality and Equality in Employment Testing*, 1976 Sup. Ct. Rev. 263, 304, 306. Oddly enough, as these commentators note, the American Psychological Association (APA) was one of the foremost critics of the EEOC's Guidelines. *See, e.g.*, Brief Amicus Curiae of the APA in *Washington v. Davis*, No. 74-1492, at 18-24, 28.

[22] In adopting the Equal Employment Opportunity Act of 1972, Congress created the EEO Coordinating Council (EEOCC) in order to eliminate inter-agency conflicts and regulatory inconsistencies. *See* Sec. 715 of Title VII, as amended in 1972, 42 U.S.C. 2000e-14. In November 1972, the EEOCC decided to develop a set of uniform guidelines reconciling inter-agency differences. The Department of Justice, the Department of Labor, and the Civil Service Commission joined in 1976 in adopting the resulting Federal Executive Agency (FEA) guidelines, which those agencies found better reflected professionally accepted standards than did the 1970 EEOC Guidelines. *See* 41 Fed. Reg. 51734 (1976); Comment, *supra*, 36 Emory L. J. at 220; Note, *The Uniform Guidelines on Employee Selection Procedures: Compromises and Controversies*, 28 Cath. U. L. Rev. 605, 608-610 (1979). The EEOC joined the other enforcement agencies in this effort in 1978.

form Guidelines, however, states that "[t]here are circumstances in which a user *cannot or need not* utilize the validation techniques contemplated by these guidelines" (29 C.F.R. 1607.6B (emphasis added)), that such "circumstance" include the use of "informal or unscored selection procedure[s]" (29 C.R.R. 1607.6B(1)), and that, where such informal or unscored selection procedures are involved, the user need only "justify continued use of the procedure[s] in accord with Federal law" (*ibid.*). Thus, unlike Section 1607.13 of the 1970 Guidelines, which imposed a formal substantiation requirement on employers using subjective selection processes associated with numerical disparaties in the workforce, the 1978 Guidelines only require the employer to "justify continued use of the procedure[s] in accord with Federal law."

The Uniform Guidelines do not clearly define how an employer "justif[ies]; continued use of the procedure in accord with Federal law." In subsequent questions and answers, the agencies stated that "[t]he method of justification of a procedure by means other than validity is one to which the Guidelines are not addressed. See Section 6B." 44 Fed. Reg. 12002 (1979). But, in the prefatory comments to the Guidelines themselves, the agencies did state that "[a] few practices may be used without validation even if they have an adverse impact. See *e.g.*, *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and section 6B." 43 Fed. Reg. 38291 n. 17 (1978). In short, the Uniform Guidelines not only provide no support for petitioner's argument that employers must validate or otherwise formally substantiate their subjective selection processes, the agencies that promulgated them appear to believe that an employer satisfies the "in accord with Federal law" standard by articulating a legitimate, non-discriminatory reason for its procedures (as in *McDonnell Douglas v. Green*).[23]

[23]Petitioner errs in suggesting (Pet. Br. 33) that administrative decisions of the EEOC establish that the Uniform Guidelines require that disparate impact analysis be applied to subjective selection processes. The decisions

This interpretation of the Uniform Guidelines is confirmed, of course, by the brief amicus curiae of the United States and the EEOC in this case. In that brief, the government and the EEOC argue that, where a subjective selection process is in issue, an employer justifies "continued use of the procedure in accord with Federal law" by setting forth legitimate, nondiscriminatory reasons for maintaining the procedure and for applying it in particular cases, as is required in a disparate treatment case. The current position of the government and the EEOC represents a "sensible construction" of both the Guidelines and the statute, a construction which is "not negated by legislative history" (*Pattern Makers League v. NLRB*, 473 U.S. 95, 116-117 (1985) (White, J., concurring)). Thus, contrary to petitioner's suggestion, if the Court is to defer in this case to the Uniform Guidelines, it should find that disparate impact theory does not apply to subjective selection processes.

IV. The Disparate Impact Theory Should Not Be Applied to Claims Involving Subjective Employment Practices or Criteria Because the Disparate Impact Theory is Inappropriate for Analysis of Such Claims

In the presentation of her case to the District Court, petitioner alleged that she was the victim of intentional discrimination, as well as discrimination resulting from the impact of respondent's subjective employment practices. However, it is clear from the record that the proof offered by petitioner was intended to present her case under the disparate treatment theory. Quite probably petitioner recognized that even if the disparate impact theory were available to her, the facts of her

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that petitioner cites arose under the 1970 Guidelines. Administrative decisions of the EEOC under the 1978 Guidelines in fact indicate that "a subjective selection process cannot be facially neutral and, thus, cannot be analyzed under the disparate impact doctrine" (*Ziman v. USPS*, No. 01842595 (July 23, 1986), at 14).

case would prevent its employment.[24] Because petitioner was unable to satisfy her burden of proof on her disparate treatment case, and because she did not identify any aspect of respondent's employment process which was suitable for testing under the *Griggs* model, the District Court found that petitioner had failed to prove her case.[25] The District Court's judgment, as it relates to the issue before this Court, was affirmed by the Court of Appeals for the Fifth Circuit.

In the decisions following *Griggs*, this Court has applied disparate impact analysis *only* to criteria which, like the high school diploma and objective test score requirements in *Griggs*, are specific, defined, identifiable, and *objective*.[26]

Petitioner's assertion that her claim should have been tested under the impact theory is erroneous because she challenges hiring criteria which she acknowledges are purely subjective. When subjective hiring practices or criteria are challenged, it is clear that the disparate treatment model is the only appropriate method for analyzing Watson's claim.[27]

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[24]As has been pointed out by one of the *amici* briefs supporting petitioner's position, the evidence presented by petitioner demonstrated that she viewed her case as appropriate for disparate treatment analysis, and further that the number of promotions sought by blacks were not of sufficient number to establish any pattern. Brief for the NAACP Legal and Education Fund, inc.; *et al*, at 2 n.1.

[25]The District Court concluded that petitioner had failed to show that the reasons articulated by respondent for promoting others, rather than petitioner, were pretext for racial discrimination. (J.A. 197).

[26]*See Connecticut v. Teal*, 457 U.S. 440, 446 (1982) (standardized test); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 589-91 (1979) (policy against employing persons who use narcotic drugs); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (height and weight requirements); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 412-13 (1975) (standardized tests). *Cf. International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (applying the disparate treatment model to a Title VII action challenging subjective hiring and promotion practices); *Hazelwood School Dist. v. United States*, 433 U.S. 299 (1977) (applying the disparate treatment model to a Title VII action challenging standardless, largely subjective hiring procedures).

[27]Title VII does not preclude use of discretion or subjectivity in decisions by employers. If the subjective criteria are applied without consideration of

Objective criteria are neutral in design *and* application. By definition, objective criteria are applied mechanically and without exception to all applicants. It is for this reason that disparate impact analysis is appropriate where objective criteria are involved. The disparate impact model looks at a facially neutral requirement which has a disparate effect upon members of a protected class, despite fairness and uniformity in treatment and application. Once such a requirement is identified by plaintiff, the employer must demonstrate that there is a valid business necessity for utilization of the requirement *Griggs*, 401 U.S. at 432.

Conversely, subjective criteria are determined by factors which are personal and individualized to the one making the selection decision. They are determined, whether consciously or not, by that person's own perspective, beliefs, background, circumstances, judgments, and ultimately intent. Subjective criteria lack the uniformity associated with objective criteria. When selection decisions are made by many different people, as was the bank's practice, the lack of uniformity is magnified even greater. When objective criteria are utilized there is a hazard that a facially neutral policy or requirement may result in discrimination, regardless of lack of discriminatory intent. However, with use of subjective criteria unintentional discrimination is not the concern. To the contrary, the principal worry is that subjective criteria will be influenced by the biases, especially racial biases, of the one making the selecting decisions. Objective criteria are applied in a mechanical fashion, but subjective criteria are employed on an ad hoc basis.[28] The disparate treatment model was created so that discrimi-

race or other irrelevant factors, there is no violation of Title VII. *See Hill v. Seaboard Coast Line RR Co.*, 767 F.2d 771, 775 (11th Cir. 1985); *Wang v. Hoffman*, 694 F.2d 1146, 1148 (9th Cir. 1982); *Bauer v. Bailar*, 647 F.2d 1037, 1046 (10th Cir. 1981).

[28] *See Zahorik v. Cornell University*, 729 F.2d 85, 95 (2d Cir. 1984); 3 A. Larson & L. Larson, *Employment Discrimination* ¶76.34 at 15-87 to 15-88.

nation rising from improper use of subjective criteria could be uncovered.

Although the disparate treatment and disparate impact theories are each designed to unearth discrimination based upon consideration of impermissible factors, the two are not applicable interchangeably. Each theory has its own unique function in bringing about the goals Congress envisioned when Title VII was enacted. As this Court observed in *Teamsters*, "[e]ither theory may, of course, be applied to a particular set of facts."[29] However, that is not to say that both theories are applicable to any and all sets of facts.[30] Even when applied to the same set of facts, the two theories serve completely different roles and functions in accomplishing Title VII's goals.[31]

If Title VII plaintiffs are permitted to apply the disparate impact model to all sets of facts, obviating the need to provide discriminatory intent, there would be no role left for the disparate treatment model in any case involving statistical proof of discrimination. By merely demonstrating an imbalance, a plaintiff could shift the heavy burden to the employer to prove that *any* employment practice, whether objective or subjective, is justified by business necessity.

Elimination of the role of the disparate treatment model would be contrary to both Congressional intent and this Court's previous interpretation of Title VII. The Court has

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[29] *International Board of Teamsters v. United States*, 431 U.S., 324, 336, n.15 (1977).

[30] Where it is alleged that an objective selection criterion results in a statistically significant racial disparity, a plaintiff could proceed under either or both theories. But one should not infer from the use of both theories to a particular set of facts that either theory can be applied to all sets of facts.

[31] This Court continues to stress that disparate treatment and disparate impact are conceptually and fundamentally different theories of discrimination. *See, e.g., Furnco* 438 U.S. at 581-82 (Marshall, J., concurring in part and dissenting in part) ("It is well established under Title VII that claims of employment discrimination because of race may arise in two different ways.") *See also United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 713 n.1 (1983); *Burdine*, 450 U.S. at 252 n.5.

recognized that "[u]ndoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." *Teamsters*, 431 U.S. at 335 n.15 (citing legislative history of Title VII). Moreover, the Court's approval of the use of statistics as evidence of intentional discrimination in *Teamsters*, 431 U.S. at 339, and *Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-08 (1977), undeniably demonstrates that a plaintiff cannot be relieved of the burden of showing discriminatory intent simply because the case involves statistical proof. It also demonstrates that the disparate impact model should not be permitted to inundate and replace the disparate treatment model in discrimination actions.

Moreover, if disparate impact analysis applies to subjective criteria, then the *Griggs* requirement that the employment practice at issue be proved to be job related will also apply to subjective criteria. Validating subjective criteria as job related, however, is impossible. It is impossible to devise objective measures of subjective qualifications. It would be futile to attempt to score criteria which involve subjective judgment. One cannot convert the subjective elements of a selection process to objective by merely ascribing numbers to them. For the same reason, it is impossible to define and devise reliable measures of job performance or employee adequacy in terms of subjective criteria, as is necessary in validation studies.[32]

More importantly, validating subjective criteria such as those used by the bank is unnecessary. The purpose of vali-

[32]Even courts which mistakenly apply disparate impact analysis to subjective systems implicitly assume that those systems inherently are incapable of being validated. They analyze the lawfulness of those systems through consideration of factors other than technical validation studies, such as the court's perception of the overall fairness to employees of the subjective procedures. *See, e.g., Rowe v. Cleveland Pneumatic Co.*, 690 F.2d 88, 90, 95 (6th Cir. 1982); *Robinson v. Union Carbide Corp.*, 538 F.2d 652, 662 (5th Cir. 1976), *cert. denied*, 434 U.S. 822 (1977); *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972). Indeed, often the factors considered have nothing to do with job-relatedness. *See, e.g., Id.*, 457 F.2d at 358-59.

dation is to determine the job-relatedness of the criterion itself without regard to the manner through which it is applied. Common sense dictates that attitude, reliability, honesty and loyalty are related to any job. The real issue with subjective criteria is whether they are fairly applied in a color-blind manner, not whether they are job related.

No employer could defend itself successfully against a charge that its subjective selection procedure was discriminatorily applied by relying upon the job-relatedness of the criteria. Thus the petitioner's assertion that the bank should be required to validate its promotion process is misplaced and unpersuasive.

Because the employer cannot defend itself against a disparate impact challenge to its subjective selection system on the grounds of business necessity, disparate impact actions challenging subjective systems are in reality merely statistical battles. The employer's only defense is to refute the plaintiffs' statistical evidence.[33] The burden which the employer must bear under disparate impact analysis to justify subjective systems which result in a significant racial disparity, therefore, is insurmountable.

The employer is then left with two choices. First, the employer can install a totally objective system. It would, for example, refrain entirely from interviewing applicants or having any other face-to-face contact with applicants (since that inevitably results in the consideration of subjective factors) even though it is well settled that subjective interviews are

[33] *See, e.g., Rowe v. Cleveland Pneumatic Co.*, 690 F.2d at 95 ("If the employer in the present case had been confronted with a *prima facie* case of disparate impact as a result of its [subjective] hiring practice, the unrestricted discretion and unexplained subjective decisions would have failed to rebut that *prima facie* case.") *Coe v. Yellow Freight Sys., Inc.*, 646 F.2d 444, 453 n.2 (10th Cir. 1981) ("[W]here the policy objected to is vague and general, once plaintiff shows discrimination by the use of statistics, the employer may only rebut the claim of discrimination by the use of statistics.").

not per se illegal and that employers are permitted to use subjective selection systems.[34]

The other more likely consequence of exposing subjective interviews to disparate impact analysis is employer reliance upon surreptitious, inflexible quota systems outside the permissible parameters of voluntary affirmative action plans.[35] The practical effect of applying disparate impact analysis to subjective criteria is simple, pure quota-based employment decisions because reliance upon a quota is the only means by which an employer can both use subjective criteria and protect itself from Title VII liability.[36] Race, then, rather than being irrelevant, becomes the most relevant factor in hiring decisions.

Quota systems, however, are blatantly contrary to the basic intent and purpose of Title VII.[37] From *Griggs* onward, the

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[34]*See, e.g., Heagney v. University of Washington*, 642 F.2d 1157 at 1163 (9th Cir. 1981); *EEOC v. Greyhound Lines, Inc.*, 635 F.2d 188 at 193 (3d Cir. 1980). *See also McDonnell Douglas Corp.*, 411 U.S. at 803 (rejecting a lower court holding that the defendant's proferred reasons for refusing to hire the plaintiff were entitled to little weight because they were subjective).

[35]Under Supreme Court precedent, while certain forms of race-conscious relief to remedy past discrimination are lawful, the type of informal, surreptitious, inflexible quota system that would inevitably result from applying disparate impact analysis to subjective criteria is unlawful. The test established in *United Steelworkers of Am. v. Weber*, 443 U.S. 193 (1979), for voluntary affirmative action programs is whether the program (1) contains safeguards necessary to avoid trammelling the rights of non-minorities, (2) is designed to remedy past discrimination and (3) is temporary. An informal quota system that is covert, unstructured, open-ended and/or has only the general goal of avoiding liability under Title VII cannot meet the criteria set forth in *Weber*. *Lilly v. City of Beckley*, 797 F.2d 191, 195 (4th Cir. 1986) (holding that a white police officer who was not hired for a job on the Beckley, W. Va. police force because of the city's informal affirmative action program was a victim of racial discrimination under Title VII).

[36]Hiring by quota to protect oneself from liability under Title VII, however, is prohibited. The Supreme Court, in *Weber*, 443 U.S. 193, refused to adopt the "arguable violation" theory as its justification for upholding an affirmative action plan. The "arguable violation" theory contends that voluntary affirmative action can stem merely from an employer's wish to insulate itself from Title VII liability.

Supreme Court has consistently held that Title VII was not designed to force an equality of group representation in the workplace.[38] As the Court first articulated in *Griggs*, "the Act does not command that any person be hired simply . . . because he is a member of a minority group. *Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed.*"[39] It would be ironic if Title VII and the *Griggs* decision, which were intended to require employers to hire applicants without regard to race according to their qualifications, should have the ultimate practical effect of discouraging color blind merit hiring.

The purported rationale of Watson's position before this Court also is prohibited by the Supreme Court's holding in *Connecticut v. Teal*, 457 U.S. 440. In *Teal*, the Court rejected the "bottom line" defense.[40] The Court explained that it "has

[37] In response to an objection posed by opponents of the bill that Title VII would require employers to establish quotas for nonwhites in proportion to the percentage of nonwhites in the labor market area, Senator Clark remarked that "[q]uotas themselves are discriminatory." 110 Cong. Rec. 7218 (1964). Both proponents and opponents of the Act agreed that Title VII did not mandate a rigid quota system in which employment opportunities would be allocated without regard to merit and solely in proportion to the representation of protected groups in the general population or in any particular pool. Thus, Section 703(j) of Title VII, 42 U.S.C. §2000e-2(j), provides in pertinent part:

> Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

[38] *See, e.g., Burdine*, 450 U.S. at 259, *Furnco*, 438 U.S. at 579; *City of Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 at 709 (1978); *McDonnell Douglas*, 411 U.S. at 800-04; *Griggs*, 401 U.S. at 430-31.

[39] 401 U.S. at 430-31 (emphasis added). *See also Teamsters*, 431 U.S. at 340, n.20 (Title VII does not require an employer's work force to be racially balanced).

[40] The plaintiffs in *Teal* challenged Connecticut's selection process for welfare supervisors. The state's promotion scheme required, first, passing a writ-

never read §703(a)(2) as requiring the focus to be placed . . . on the overall number of minority or female applicants actually hired or promoted," *id.* at 450, and ruled that Title VII requires that the focus be upon discrimination against individuals, not groups. *Id.* at 451, 453-54. Just as the "bottom line" cannot provide a defense to a charge of discrimination, it cannot provide the basis for finding liability.

Watson and her *amici* argue that the disparate impact model must be made available to analyze subjective selection criteria or such employment practices will be insulated from challenge under Title VII. The only basis for her assertion is the unsubstantiated assumption that the disparate treatment model is not suited to prove unlawful discrimination.[41] Watson would have this Court turn all Title VII cases which contain evidence of a statistical imbalance into a disparate impact case.

As an illustration of the problem she perceives, Watson cites the Fifth Circuit's decision in *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798 (5th Cir. 1982).[42] Watson implies that because of the Fifth Circuit's decision in *Pouncy v. Prudential Insurance Company of America*, 668 F.2d 795 (5th Cir. 1982) the plaintiff was denied an opportunity to challenge

ten test and, second, consideration of work experience, recommendations and seniority. Evidence showed that disproportionately more blacks than whites failed the test but that disproportionately more blacks than whites were promoted. The plaintiffs argued that the scheme violated Title VII under the disparate impact theory because the state had not validated the written test as job-related. The state argued that the result of the entire process, reflecting no adverse impact on minority group members, precluded the finding of a Title VII violation.

[41]Merely because petitioner's case was largely based upon statistical proof does not mean that the disparate treatment model was unavailable to her. In light of *Teamsters*, 431 U.S. 324 (1977), and *Hazelwood*, 433 U.S. 299 (1977), courts have held that statistical proof is relevant and important in an individual claim of disparate treatment. *See, e.g., Davis v. Califano*, 613 F.2d 957, 962 (D.C. Cir. 1980); *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 762 (9th Cir. 1980).

[42]Petitioner's Brief at 38-9.

Travenol's subjective interview system because he could not use the disparate impact model. However, such was not the result in *Payne*. The Fifth Circuit analyzed proof which the plaintiff had tailored to meet the *Griggs* disparate impact elements under the disparate treatment model required by *Pouncy*. Relying upon this Court's decisions in *Teamsters* and *Hazelwood*, the Fifth Circuit affirmed the trial court's conclusion that because of its use of a subjective interview process, Travenol had engaged in intentional discrimination.[43]

Thus, it seems clear that Title VII plaintiffs do not need an additional method for challenging subjective employment practices. The disparate treatment model of *McDonnell Douglas/Burdine* and its application in *Teamsters* and *Hazelwood* provide the proper theory for rooting out any discriminatory intent or treatment contained in an employer's subjective empioyment practices. Petitioner's claims were properly considered by the trial court under the disparate treatment model. There is no necessity or basis for creating a different model to review them again. Petitioner was unable to convince the trier of fact that she had been the victim of discriminatory treatment and the Court of Appeals has affirmed. Those factual findings are not challenged before this Court, therefore this Court should affirm the Court of Appeals judgment.[44]

V. The Better Reasoned Decisions of the Courts of Appeals Recognized that Disparate Impact Model is not Appropriate for Analyzing Subjective Employment Judgments

Petitioner has incorrectly represented to the Court that nine of the twelve Courts of Appeals have adopted the dispar-

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[43] *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, at 815-20.

[44] *See, Goodman v. Lukens Steel Co.*, 482 U.S. _____, 96 L.Ed.2d 572, 584, 107 S.Ct. _____ (1987) (In a Title VII case, where the Court of Appeals did not set aside the trial court's findings of fact, on *certiorari* this Court will not examine the record "absent some extraordinary reason.").

ate impact model for review of subjective selection criteria. (Pet. Br. 35, 36, 47). While there are indeed some of the Circuits which have adopted the position advocated by petitioner, impact analysis of subjective criteria has only been consistently applied in four Circuits.[45] The better reasoned and more recent decisions of the remaining Circuits either directly support respondent or indicate approval of the authority followed in the case at bar.

In *Pouncy v. Prudential Ins. Co. of America*, 668 F.2d 795 (5th Cir. 1982) the Fifth Circuit first considered the suitability of applying the disparate impact model to analyze a claim that certain employment practices fell more harshly on blacks when no facially neutral employment practices were identified by the plaintiff. Among the challenged employment practices was the claim that Prudential used subjective criteria to evaluate its employees. The Fifth Circuit held that such practices were not the type of facially neutral employment practices to which the disparate impact model applies.

The Tenth Circuit considered this issue in a factual context which is quite similar to that presented by Watson. In *Mortensen v. Callaway*, 672 F.2d 822, 824 (10th Cir. 1982), the plaintiff sought to apply impact analysis to a subjective evaluation system which determined who was selected for promotion. The Tenth Circuit rejected use of disparate impact analysis, holding that the subjective selection criteria "were not criteria an employee had to meet or test an employee had to pass in order to be considered" for the promotion.[46]

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[45] Sixth Circuit, *see, e.g., Rowe v. Cleveland Pneumatic Co., Numerical Control*, 690 F.2d 88, 93 (6th Cir. 1982); Ninth Circuit, *see, e.g., Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1480-1486 (9th Cir. 1987) (*en banc*); Eleventh Circuit, *see, e.g., Griffin v. Carlin*, 755 F.2d 1516, 1524-1525 (11th Cir. 1985); District of Columbia Circuit, *see, e.g., Segar v. Smith*, 738 F.2d 1249, 1270-1272, 1288 n.34 (D.C. Cir. 1984) *cert. denied*, 471 U.S. 1115 (1985).

[46] *Mortensen v. Callaway*, 676 F.2d at 824 n.1.

This same result was reached by the Eighth Circuit in *Harris v. Ford Motor Co.*, 651 F.2d 609, 611 (8th Cir. 1981). The Court stated: "A subjective decision-making system, however, is not the type of practice outlawed in *Griggs*". *Harris v. Ford Motor Co.* at 611. The Eighth Circuit's rejection of use of impact analysis of subjective criteria was recently reaffirmed in *Paige v. Marsh*, No. 86-1282 (slip op; available on Lexis) (8th Cir. Feb. 3, 1987).

The position of the Fourth Circuit is in line with the Fifth Circuit's decision in *Pouncy*. Subjective employment practices are not appropriate for disparate impact analysis because of the lack of any "objective standard, applied evenly and automatically". *Stastny v. Southern Bell Telephone & Telegraph Co.*, 628 F.2d 267, 274 (4th Cir. 1980). *See also*, *Brewster v. Barnes*, 788 F.2d 985, 993 (4th Cir. 1986). The Seventh Circuit also recognizes that claims which challenge the manner which employment practices are *applied* are inherently intent-based and must be tested under the treatment theory. In refusing to apply impact analysis to subjective criteria, the Court in *Coates v. Johnson & Johnson Co.*, 756 F.2d 524 (7th Cir. 1985) said that the essence of the plaintiff's claim did not involve rules which were facially neutral, but instead the plaintiff's complaint was that the rules were "more severely applied, through supervisory discretion", to blacks than to whites.[47] Where the issue is the manner a rule or requirement is *applied*, rather than the *effect* of the rule or requirement, the proper framework for analyzing the evidence presented is the disparate treatment model.

Perhaps the Second Circuit's opinion in *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d 590 (2d Cir. 1986) best characterized the paradoxical nature of Watson's position. On the one hand she attacks the bank's subjective evaluation system as being inherently suspect (hinting strongly of a claim of intentional

[47] *Coates v. Johnson & Johnson Co.*, 756 F.2d at 530-531 n.4.

discrimination), but on the other she claims that the bank's subjective evaluation system constitutes a facially neutral standard, appropriate for disparate impact analysis. The Court points out that when subjective criteria are at issue, it is "logically impossible to prove both propositions."[48] Judging from the manner Watson presented her case in the District Court, it appears that she recognized that impact analysis was not available to her and, accordingly, concentrated her efforts in an attempt to prove a disparate treatment case.

Although the recent decision of the Ninth Circuit, *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987) (*en banc*) differs with respondent on use of impact analysis to test subjective employment practices, *Atonio* is consistent with *Pouncy* in prohibiting use of the disparate impact model to attack an employer's overall selection process. Both the majority and concurring opinions make clear that impact analysis would be available only where the plaintiff (1) identifies a specific selection criterion, and (2) establishes a casual connection between the identified practice and the impact.

The D.C. and Eleventh Circuits have also held that the disparate impact model can be applied to subjective, multiple criteria. In *Griffin v. Carlin*, 755 F.2d 1516 (11th Cir. 1985), the Court, completely ignoring the availability of the disparate treatment model to analyze adverse impact against a protected group, reasoned that "limiting the disparate impact model to situations in which a single component of the process results in an adverse impact completely exempts the situation in which an adverse impact is caused by the interaction of two or more components." 755 F.2d at 1525. Further, the Court errs in suggesting that employers are better situated to identify the variable of their multi-component or multi-step selection process that caused the adverse impact. There is no merit to the Eleventh Circuit's suggestion. A two-equation regres-

[48] *Rossini v. Ogilvy & Mather, Inc.*, 798 F.2d at 605.

sion analysis will identify which variable, if any, is responsible for the challenged disparity.[49] The plaintiff can conduct that regression analysis as easily as can the employer. As this Court has observed, the liberal rules of discovery and plaintiff's access to the EEOC's investigatory files makes the plaintiff sufficiently well situated to explain the challenged employment decisions.[50] The Eleventh Circuit's holding on this issue was unnecessary and not consistent with this Court's decisions.

In *Segar v. Smith*, 738 F.2d 1249, 1271-72 (D.C. Cir. (1984), *cert. denied sub nom. Meese v. Segar*, 471 U.S. 1115 (1985), the Court created its own hybrid disparate impact/disparate treatment model in which disparate treatment analysis is completely subsumed within disparate impact analysis. In *Segar*, the Court attempted to justify requiring the employer to pinpoint the employment practice in the subjective system at issue causing the disparity. The Court reasoned that after the employer effectively rebuts the disparate treatment claim by articulating a legitimate business reason for the disparity, the employer already will have identified which employment practices caused the observed disparity and, therefore, which employment practices it will have to validate as job-related under the disparate impact theory. 738 F.2d at 1271-72, 1288. The Court, therefore, not only required the defendant to prove the causation element of the plaintiffs' prima facie disparate impact case, but also rendered the disparate treatment model totally unnecessary. Under *Segar*, when the employer avoids liability under the disparate treatment theory by articulating a legitimate business reason, the plaintiff can, without any further proof, merely switch over to the disparate impact theory and require the employer to prove that the legitimate

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[49] *See*, Campbell, *Regression Analysis In Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law And Statistics Meet*, 36 Stan. L. Rev. 1299, 1312-1319 (1984).

[50] *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 258 (1981).

business reason is also a business necessity. Disparate treatment thereby would become completely subsumed within the disparate impact.

Segar further errs in suggesting that discriminatory intent is difficult to prove, necessitating an alternative method for plaintiffs to prove their cases. *Segar* incorrectly proposes that the *McDonnell Douglas* and *Burdine* framework may be abandoned, and the *Griggs* proof substituted, whenever a defendant articulates a nondiscriminatory reason for the challenged action. The *Segar* approach is further flawed in that it created a procedural scheme which allows the plaintiff to pursue a Title VII claim without giving the defendant notice of the claim to be advanced. Since the true focus of inquiry will not be identified until the defendant articulates it nondiscriminatory reason for the challenged employment action, the defendant is required to show the business necessity of employment practices which were not identified by the plaintiff. The hybrid procedural approach suggested by *Segar* is totally contrary to the carefully crafted analytical framework created by this Court and has no application to the case at hand.

As has been demonstrated, the better reasoned decisions of the Court of Appeals support respondent's position that impact theory should not be extended to analyze subjective employment criteria. The decision of the Fifth Circuit below is consistent with this Court's prior decisions and represents the most logical approach for the analysis of such subjective criteria.

CONCLUSION

In the above reasons, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

Bruce W. McGee*
Joseph W. Spence
GANDY MICHENER SWINDLE
WHITAKER & PRATT
2501 Parkview Drive, Suite 600
Fort Worth, Texas 76102
(817) 878-0565

Attorneys for Respondent

*Counsel of Record